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In The

Supreme Court of the United States

SEA HAWK SEAFOODS, INC. ET AL.,

Petitioners,

v.

GARY F. LOCKE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether an agency can effectively avoid judicial review under the Administrative Procedure Act of regulations required under one statute by unilaterally promulgating the regulations "in part" under a different statute that severely limits judicial review. The Ninth Circuit's holding that agencies can do so conflicts with this Court's precedent and with decisions of every other circuit that has addressed the issue.

LIST OF PARTIES

Plaintiff-Appellant-Petitioner:

Sea Hawk Seafoods, Inc.

Non-AFA Processors Association

Defendant-Appellee-Respondent:

Gary F. Locke

United States Department of Commerce

National Oceanic and Atmospheric Administration

National Marine Fisheries Services

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Sea Hawk Seafoods, Inc. represents that there is no parent corporation or any publicly held corporation that owns 10% or more of Sea Hawk Seafoods, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sea Hawk Seafoods, Inc. and the Non-AFA Processors Association ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's unpublished order granting the United States' motion to dismiss Petitioners' claims pursuant to Fed. R. Civ. P. 12(b)(1) is reproduced in the appendix ("App.") at 22-26. The Ninth Circuit's decision affirming the district court's order is published at 568 F.3d 757 (9th Cir. 2009), and is reproduced at App. 1-21. The Ninth Circuit's order denying Petitioners' petition for rehearing and suggestion for rehearing en banc is reproduced at App. 27.

JURISDICTION

The Ninth Circuit filed its decision on June 17, 2009 and denied Sea Hawk's timely petition for rehearing and suggestion for rehearing en banc on September 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 706 of Title 5 to the United States Code provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 1855(f)(1) of Title 16 to the United States Code provides:

> Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that –
>
> > **(A)** section 705 of such title is not applicable, and
> >
> > **(B)** the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

Section 2401(a) of Title 28 to the United States Code provides:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced

> against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

STATEMENT OF THE CASE

I. LEGISLATIVE AND REGULATORY BACKGROUND

Congress enacted the American Fisheries Act ("AFA") in 1998, among other things, to "rationalize" the North Pacific Pollock Fishery by providing exclusive rights to certain companies and vessels. App. 6. In essence, the AFA granted statutory monopoly power to fishing cooperatives formed under the AFA and to AFA-designated processors. *Id.* Congress recognized that this monopoly power could have adverse economic effects on nonparticipating processors. *Id.* As a result, the AFA requires the North Pacific Council (the "Council") to recommend management measures and other protections for those processors. *Id.* at 6-7.

In passing the AFA, numerous members of Congress specifically recognized the importance of such measures and protections. In discussing the bill that enacted the AFA, Washington Senator Patty Murray stated:

> "While we have attempted to include at least a minimum level of protections for these other fisheries, it is clear to many of us that unintended consequences are likely. It is therefore imperative that the fishery management councils not perceive the protections provided in this bill as a statement by Congress that these are the only protections needed. In fact, the opposite is true."

App. 6 n.4 (*quoting* 144 Cong. Rec. S12,696, S12,708 (daily ed. Oct. 20, 1998)). Speaking for those individuals "involved intimately in the development of [the AFA]," Senator Murray "strongly urged" the Council to "ensure that other fisheries are held harmless to the maximum extent possible." *Id.*

Alaska Senators Frank Murkowski and Ted Stevens echoed Senator Murray's statements. Senator Murkowski emphasized that AFA cooperatives "should not be empowered by this legislation to gain a competitive advantage in . . . other fisheries to the detriment of participants who have not benefited from the resolution of the Pollock fishery problems." 144 Cong. Rec. S12,708 (daily ed. Oct. 20, 1998). Senator Stevens, in turn, added that "[t]he intent of [AFA § 211(c)] is to protect processors that are not . . . eligible from increased competition from shoreside processors who have had a financial advantage as a result of the increased pollock allocation under the [AFA] or by receiving pollock under a fishery cooperative." 144 Cong. Rec. S12,781 (daily ed. Oct. 21, 1998).

Consistent with its legislative history, the AFA specifically requires the Council to "'protect processors not eligible to participate in the directed pollock fishery from adverse effects' resulting from the AFA." App. 7 (*quoting* AFA § 211(c)(1)). The AFA also states that the Council "'shall recommend for approval by the Secretary such conservation and management measures as it determines are necessary to protect . . . processors . . . from the adverse impacts caused by [the AFA] or fishery cooperatives in the directed pollock fishery.'" App. 7 (*quoting* AFA § 211(a)). These protections are referred to as "sideboard protections" or simply "sideboards." *Id.*

As the Ninth Circuit correctly noted, the regulations at issue in this proceeding "were prompted by passage of the" AFA. App. 3. The summary included with the final rules confirms that point; it specifically states that the amendments and management measures were necessary "to implement the AFA." App. 11 (*quoting* 67 Fed. Reg. 79,692). As a result, any challenge to the regulations would necessarily be subject to the six-year limitations period that applies to agency action under the Administrative Procedure Act ("APA") because the AFA – the implementing statute – does not include a shorter or different limitations period. App. 14; *see also* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

The Magnuson-Steven Fisheries Conservation and Management Act ("MSA") also governs the

Council's actions. Congress enacted the MSA in 1976 in an effort to, among other things, "'conserve and manage the fishery resources found off the coasts of the United States.'" App. 3 (*quoting* 16 U.S.C. § 1801(b)(1)). The MSA requires the Council to perform that function through "fishery management plans" ("FMPs"), which are submitted by the Council to the Secretary of Commerce (the "Secretary") for approval. App. 4. FMPs establish general limitations on fisheries, including "seasonal restrictions and gear limitations," to "achieve and maintain, on a continuing basis, the optimal yield from each fishery." *Id.* (*citing* 16 U.S.C. § 1801(b)(4)).

The MSA specifies the procedures for implementing or amending an FMP. Upon receipt of an FMP or amendment, the Secretary must publish a notice in the Federal Register stating that the FMP or amendment is available for public comment. *Id.* (*quoting* 16 U.S.C. § 1854(a)(1)(B)). Because FMPs provide "seasonal restrictions" and generally govern each forthcoming fishing season, they must be reviewed and promulgated quickly. The public comment period is therefore 60 days, and judicial review is permitted only if a petition for review is filed "within 30 days after the date on which the . . . action is published in the Federal Register." App. 5 (*quoting* 16 U.S.C. § 1855(f)(1)).

Although not required to do so by the AFA or the MSA, the Agency here promulgated its AFA sideboards by amending the FMPs that govern the Bering Sea and Aleutian Islands ("BSAI") pollock fishery.

App. 8.[1] As a result, the regulations indicate that they were developed "under the Magnuson-Stevens Act and American Fisheries Act . . . to govern commercial fishing for BSAI pollock according to the requirements of the AFA." App. 11-12 (*quoting* 67 Fed. Reg. 79,721). Stated another way, the regulations were promulgated using MSA rulemaking procedures even though the purpose of the regulations was, as the Ninth Circuit noted and the legislative history of the AFA confirms, "to implement the AFA." App. 11 (*quoting* 67 Fed. Reg. at 79,692).

II. PETITIONERS AND THEIR CLAIMS AGAINST THE AGENCY

Petitioners in this matter operate shoreside fish-processing facilities in Alaska waters and are adversely affected by the statutory monopoly granted to eligible processors under the AFA. App. 9. Petitioners complained to the Agency that the AFA regulations did not provide adequate sideboard protections for non-AFA shoreside processors with respect to fish other than pollock (such as salmon, black cod, and halibut). *Id.* In particular, Petitioners were concerned that beneficiaries of the statutory monopoly in the pollock industry could use this competitive advantage to leverage their monopoly power into the salmon

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[1] As used herein, "Agency" refers to the U.S. Secretary of Commerce, the U.S. Commerce Department, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service. App. 2.

industry, which would of course undermine Petitioners' livelihood. App. 10.

Petitioners specifically advised the Council of their concerns regarding "the anticipated encroachment of AFA-owned or controlled processor vessels into [Prince William Sound]," but the Council did nothing to address that concern. App. 10-12. As the Ninth Circuit correctly noted, "[a]lthough the AFA required the Council to recommend sideboards for both non-AFA catcher vessels and processors, AFA § 211(c)(1), *the Council decided not to take any action with regard to non-AFA processors*." App. 12 (emphasis added). Sea Hawk continued to complain, prompting the Agency to write a May 18, 2006 letter explaining its refusal to take appropriate action to protect non-AFA processors. App. 12-13.

Upon receipt of the Agency's unequivocal refusal to take corrective action, Petitioners filed this lawsuit. Petitioners did so on November 8, 2006 – well within the six-year limitations period applicable to AFA actions. App. 13. The district court nevertheless dismissed Petitioners' complaint as time-barred, and the Ninth Circuit affirmed. The central thrust of the Ninth Circuit's ruling is as follows:

> [A]lthough the [regulations at issue] were intended to implement AFA-related amendments, the regulations were promulgated under the MSA, even if in part. Accordingly, the [MSA's] thirty-day review period bars as untimely [Petitioners'] challenge to the regulations.

App. 16-17 (footnote omitted). In other words, because the Agency unilaterally chose to promulgate its AFA regulations pursuant to the rulemaking procedures in the MSA, the Ninth Circuit affirmed the district court's dismissal of Petitioners' lawsuit as time-barred even though Petitioners filed that lawsuit within the six-year limitations period applicable to AFA actions.

REASONS FOR GRANTING THE PETITION

The question presented in this matter is whether an agency can effectively avoid judicial review under the APA of regulations required under one statute by unilaterally promulgating the regulations "in part" under a different statute that severely limits judicial review. Here, the Agency promulgated amendments to an FMP that, as the Ninth Circuit correctly recognized, "were prompted by passage of the [AFA]." App. 3. Under the AFA, a party has six years in which to challenge such agency action. App. 14. But "although the . . . regulations were intended to implement AFA-related amendments," they were "developed, published for review, and promulgated pursuant to the . . . procedures" set forth in the MSA. App. 16. The MSA imposes a 30-day limitations period, which the Ninth Circuit held "compelled" dismissal of Petitioners' challenge to the AFA amendments as time-barred *even though Petitioners asserted that challenge within the six-year limitations period applicable to AFA actions*. App. 13-17.

This Court should review the judgment and opinion of the Ninth Circuit because the court's opinion conflicts with controlling opinions of both this Court and every other circuit that has addressed the issue. This Court has repeatedly held that agency action is subject to review under the APA and is therefore subject to a six-year limitations period absent "clear and convincing evidence of contrary legislative intent." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (internal quotation marks and citation omitted). Lower courts have consistently followed *Bowen*. The Ninth Circuit, in contrast, concluded that the six-year limitations period for AFA regulations does not apply to Petitioners' claims and that the 30-day limitations period in the MSA does apply to those claims based on the *Agency's* unilateral decision to promulgate AFA regulations under the MSA. App. 16-17. That decision says nothing about *legislative* intent, which is dispositive on this point. Indeed, the Ninth Circuit's analysis *conflicts* with legislative intent: Congress indicated those instances in which AFA regulations are to be promulgated under the MSA, and this case does not involve any such regulations.

It is equally clear that the question presented is "important" and therefore warrants further review under Sup. Ct. R. 10(a). Numerous agencies are required to implement regulations pursuant to overlapping regulations, many of which include short limitations periods or provisions that otherwise curtail judicial review. The Ninth Circuit's opinion

provides a roadmap for such agencies to avoid or limit judicial review: agencies can simply promulgate regulations that are prompted by the passage of one statute using the rulemaking procedures in another – "more favorable" – statute. The result is that litigants may be unable to challenge agency actions under a given statute even if, as is true in this case, they do so in full compliance with the limitations period and other procedures applicable to that statute.

Moreover, the economic nature of the AFA regulations underscores the importance of effective judicial review. As noted, the AFA grants monopoly power to a defined group of favored processors at the direct expense of non-AFA processors. Congress therefore emphasized the importance of protecting non-AFA processors from adverse effects resulting from the AFA. Given the absence of free market competition, it is especially important that courts step in, as necessary, to protect those whose livelihoods and investments are at risk. For this reason too, the Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH DECISIONS OF EVERY OTHER CIRCUIT THAT HAS ADDRESSED THE ISSUE

This Court has repeatedly explained that there is a "strong presumption that Congress intends judicial

review of administrative action." *Bowen*, 476 U.S. at 670. As a result, APA review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* (internal quotation marks and citation omitted). To satisfy this requirement, the party opposing judicial review must provide "clear and convincing evidence" of "*legislative* intent" to limit judicial review. *Id.* at 671 (emphasis added; internal quotation marks and citation omitted). As the Court noted in *Bowen*, this legal principle dates back to its landmark opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *Bowen*, 476 U.S. at 670.

One way (perhaps the only way) to limit judicial review of agency action is to point to "specific language or legislative history that is a reliable indicator of congressional intent." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). Conversely, Congress's failure to specifically provide for judicial review in a statute "is certainly not evidence of intent to withhold review." *Bowen*, 476 U.S. at 671 (internal quotation marks and citation omitted). In that circumstance, "where substantial doubt about congressional intent exists," the "general presumption favoring judicial review of administrative action is controlling." *Id.* at 672 n.3 (*quoting Block*, 467 U.S. at 350-51).[2]

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[2] Numerous other opinions are to the same effect. *See, e.g., Japan Whaling v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4

(Continued on following page)

Lower courts have *consistently* adhered to these legal principles and have *consistently* held that agency action, including promulgation of regulations, cannot preclude judicial review in the absence of express Congressional intent to do so. In *Amberg v. FDIC*, 934 F.2d 681 (5th Cir. 1991), for example, the Fifth Circuit considered whether an agency, through regulation, could truncate the time period for an aggrieved party to request a hearing. On the premise that "judicial review will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress," the Fifth Circuit held that the agency could not and, therefore, the court had jurisdiction to find the request was timely. *Id.* at 684.

Likewise, in *Nagahi v. Immigration & Naturalization Service*, 219 F.3d 1166 (10th Cir. 2000), the Tenth Circuit held that, in the absence of Congressional authorization to "regulate the scope of the judicial power vested by the statute," the agency could not limit the time for judicial review by regulation. Specifically, the Tenth Circuit opined that the district court erred in relying on agency regulations to find the petitioner's claim time barred. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate [limits on judicial review] unless the power is conveyed by

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(1986); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds*, *Califano v. Sanders*, 420 U.S. 99 (1977); *Abbott Labs v. Gardner*, 367 U.S. 136, 140 (1967).

Congress in express terms." *Id.* at 1170 (*quoting Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)).

The Eleventh Circuit followed suit in *Memorial Hospital v. Heckler*, 706 F.2d 1130 (11th Cir. 1983). At issue in that case was a provision in the Medicare Act that exempted from judicial review findings that particular items are not eligible for reimbursement. The Secretary of the Department of Health and Human Services relied on that provision to argue that a regulation defining telephone service as a "personal comfort" item and, as such, ineligible for reimbursement was, therefore, immune from review. *Id.* at 1132. The Eleventh Circuit rejected that argument, noting that the Medicare Act did not specifically include telephone service in its list of exempt items. Insulating the "policy decisions of the Secretary" from review would "give the Secretary virtually unbridled discretion to prevent reimbursements through regulation. Such a result would run contrary to the presumption favoring judicial review." *Id.* at 1133.

The District of Columbia Circuit has similarly ruled. In *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994), for example, the D.C. Circuit considered the enforceability of a mandatory "incorporation clause" in construction contracts entered into with the Department of Labor. That clause incorporated all Department of Labor regulations into the contract and, as such, the government argued that the contractor was precluded from challenging

the validity of such regulations. The court found that nothing in the Davis-Bacon Act "specifically authorize[d] the Secretary to promulgate regulations requiring contractors to agree to waive judicial review normally available under the APA." *Id.* at 1451. Absent "clear and convincing evidence" of Congressional intent to preclude review, the "Secretary, therefore, cannot adopt regulations erasing the presumption of reviewability embodied in the APA." *Id.* at 1450-51. Other District of Columbia Circuit opinions are to the same effect.[3]

The Ninth Circuit here ignored these controlling legal principles in applying the MSA's 30-day limitations period to Petitioners' claims. As noted previously, the central thrust of the Ninth Circuit's ruling that Petitioners' claims are subject to the 30-day limitations period in the MSA is that "although the [regulations at issue] were intended to implement AFA-related amendments, the regulations were promulgated under the MSA, even if in part." App. 16. In direct conflict with *Bowen* and other similar

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[3] *See, e.g., El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) ("The Supreme Court has long instructed that the generous review provisions of the APA must be given a hospitable interpretation such that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." (internal quotation marks and citation omitted)); *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) ("it is only statutes, not agency regulations, that can preclude otherwise available judicial review").

cases, the Ninth Circuit looked at the *agency's* actions in deciding to limit judicial review, thus giving the agency unfettered discretion to limit judicial review of its own actions.

The relevant inquiry here, which the Ninth Circuit overlooked, is whether *Congress*, when it passed the AFA in 1998, intended to restrict judicial review of AFA § 211(c)(1) sideboard regulations. The Ninth Circuit identified no such evidence of legislative intent, and indeed there is none. The AFA is silent on judicial review, and therefore "the general presumption favoring judicial review of administrative action is controlling." *Block*, 467 U.S. at 350-51; *Bowen*, 476 U.S. at 671 (silence in statute regarding judicial review of agency action "is certainly no evidence of an intent to withhold review"). Accordingly, the six-year limitations period in the APA, and not the 30-day limitations period in the MSA, is controlling.

Importantly, had the Ninth Circuit reviewed the AFA for clear and convincing evidence of legislative intent to limit judicial review, it would have found evidence directly contrary to its holding. In specific sections of the AFA, including § 211(c)(2) regarding limitations on crab and ground fish activities, Congress instructed the Agency to act pursuant to the "authority" of the MSA. By contrast the adjoining section of the AFA at issue in this appeal, § 211(c)(1), says nothing about either the authority or the procedures of the MSA. If anything, the AFA shows that Congress did *not* intend to limit judicial review

regarding the AFA § 211(c)(1) regulations at issue here.[4]

While it is true, as the Ninth Circuit noted (Op. 7233), that the MSA limits judicial review of agency action, Congress's intent in passing the MSA sheds no light on its intent to limit judicial review under the AFA, which Congress enacted *years later*. The AFA was not an amendment to the MSA and did not incorporate the "procedures" of the MSA or its jurisdictional limitations. The AFA is a separate and independent statutory obligation requiring the Agency to take certain *additional* actions. Those actions are subject to judicial review under the APA (including that statute's six-year limitations period) unless the *AFA* indicates otherwise, which as noted above it does not.

Indeed, the MSA itself states that its limitation on judicial review applies only to "[r]egulations promulgated by the Secretary under this chapter [the MSA]." 16 U.S.C. § 1855(f). Notably the Ninth Circuit did not conclude that the regulations at issue here were promulgated "under" the MSA. Rather, the Ninth Circuit concluded – based on *agency* action – that the regulations "were promulgated, at least *in*

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[4] *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and citation omitted; ellipsis in original)).

part, under the MSA." App. 15 (emphasis added). Congress did not state in the MSA that such actions should be subject to the statute's 30-day limitations period. At the very least, there is "substantial doubt about congressional intent," in which case the "general presumption favoring judicial review of administrative action is controlling." *Bowen*, 476 U.S. at 672 n.3 (internal quotation marks and citation omitted).

Finally, the Ninth Circuit also noted "in passing" that applying the MSA's 30-day limitations period to Petitioners' claims is "not particularly unfair." App. 17. Whether it is fair or not is irrelevant under *Bowen* and other such cases, which make clear that APA review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen*, 476 U.S. at 670 (internal quotation marks and citation omitted). Moreover, Petitioners could not have known in 1999 (when they first complained to the Agency) or in 2002 (when the AFA regulations were promulgated) that the Agency would ultimately refuse to take corrective action when requested to do so in 2006. App. 12-13, 17-18. This is not a "persuasive reason" – let alone "clear and convincing evidence" of "legislative intent" – to limit judicial review.

Equally important, applying the MSA's 30-day limitations period to AFA regulations ignores the purpose of the AFA. As noted, the purpose of the regulations at issue here is to "protect processors not eligible to participate in the directed pollock fishery

from adverse effects as a result of this Act or fishery cooperative in the directed pollock fishery." AFA § 211(c)(1)(B). Unlike MSA regulations (such as gear restrictions, catch limits, and season lengths), where the impact is apparent from the outset, the impact of anticompetitive behavior may not be apparent for years. Contrary to the Ninth Circuit's holding, it is manifestly unfair to require affected parties to challenge AFA regulations within 30 days or be forever barred from so doing.

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

The above discussion shows that the Ninth Circuit's opinion is in direct conflict with the strong presumption in favor of judicial review as set forth in *Bowen* and the numerous other opinions cited above. The Ninth Circuit's reliance on *agency* action to limit (and in this case preclude) judicial review creates an irreconcilable conflict between circuit precedents, which by itself warrants review. *See* Sup. Ct. R. 10(a).

The Ninth Circuit's opinion also involves a recurring issue of substantial importance, which likewise warrants review. *Id.* While courts have recognized Congress's ability to limit judicial review of agency action, no court has permitted federal agencies to do so without Congressional authorization or intent. Such a holding is directly contrary to fundamental principles of judicial review. *See, e.g.*,

Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 650 (1990) (Congressional authority to implement statute "does not empower the Secretary to regulate the scope of the judicial power vested by the statute."); *California v. Fed. Power Comm'n*, 369 U.S. 482, 490 (1962) ("Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency.").

Despite this body of law, the Ninth Circuit relied on *agency* action to limit judicial review of the Agency's AFA § 211(c)(1) sideboard protections. As explained above, the Agency *unilaterally* chose to promulgate the AFA § 211(c)(1) sideboard protections pursuant to the rulemaking procedures in the MSA, without any indication of Congressional authorization or intent. The Ninth Circuit relied on that *unilateral* decision in applying the MSA's 30-day limitations period to Petitioners' claims. As a result, the Agency can now immunize its regulations from judicial review under the APA simply by choosing to promulgate its regulations – "at least in part" – under the MSA. App. 16. Such a result is contrary to controlling case law.

Nor is the opinion's impact limited to AFA regulations. Congress requires many federal agencies to comply with a wide variety of overlapping statutory mandates, many of which significantly limit judicial review. One such statute (among many others) is Section 307 of the Clean Air Act, 42 U.S.C. § 7607, which mandates a 60-day limitations period for judicial review of clean air regulations. Under the

Ninth Circuit's reasoning, the Environmental Protection Agency can limit judicial review of its actions simply by promulgating any or all of its regulations – "at least in part" – under the Clean Air Act.[5]

Many other statutes similarly limit judicial review of agency actions. *See, e.g.*, 28 U.S.C. §§ 2342, 2344 (60-day limitations period for challenges to certain actions of six agencies, including Departments of Agriculture and Transportation); 42 U.S.C. § 6976 (60-day limitations period for challenges to regulations issued under Solid Waste Disposal Act); 7 U.S.C. § 136n (60-day limitations period for challenges to orders issued under Federal Insecticide Fungicide and Rodenticide Act). Following the Ninth Circuit's analysis, numerous such agencies can now trigger these limitations periods simply by promulgating regulations – "at least in part" – under such statutes.

More troubling still, numerous federal statutes *completely preclude* judicial review of certain agency actions. *See, e.g.*, 42 U.S.C. § 1395l(t)(12) (precluding review of certain Medicare decisions); 23 U.S.C. § 136(f) (precluding review of transportation plans); 22 U.S.C. § 2778(h) (precluding review of certain

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[5] In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 533 (2007), the Court criticized the EPA for failing to regulate greenhouse gases based on jurisdictional and prudential concerns, noting that "the use of the word 'judgment' is not a roving license to ignore the statutory text" of the Clean Air Act. The same reasoning applies here as well.

regulations under the Arms Export Control Act). Thus, not only can federal agencies invoke the Ninth Circuit's analysis to limit the time period for judicial review, but in some instances an agency could use the Ninth Circuit's decision to insulate its decisions from any judicial review whatsoever.

As to all of these issues, the Court aptly recognized in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury." 5 U.S. at 163. The availability of judicial review is a matter of national importance and should not vary from circuit to circuit – as it would if the Ninth Circuit's decision is permitted to stand.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEA HAWK SEAFOODS, INC., an Alaska corporation; NON-AFA PROCESSORS ASSOCIATION,

Plaintiffs-Appellants,

v.

GARY F. LOCKE, in his official capacity as United States Secretary of Commerce; UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; NATIONAL MARINE FISHERIES SERVICE,

Defendants-Appellees.

No. 07-35754.

D.C. No. CV-06-01616-JCC

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
December 9, 2008 – Seattle, Washington

Filed June 17, 2009

Before: Ronald M. Gould, Richard C. Tallman and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

COUNSEL

Leonard J. Feldman, Michael T. Shein, Kevin P. Sullivan, Seattle, Washington, on behalf of appellants Sea Hawk Seafoods, Inc. and the Non-AFA Processors Association.

Anna T. Katselas, United States Department of Justice, Washington, D.C., on behalf of appellees Gary F. Locke, United States Secretary of Commerce; United States Department of Commerce; National Oceanic and Atmospheric Administration; and National Marine Fisheries Service.

OPINION

CALLAHAN, Circuit Judge:

Sea Hawk Seafoods, Inc. ("Sea Hawk") and the Non-AFA Processors Association (collectively, "Plaintiffs") appeal the district court's dismissal of their claims against the United States Secretary of Commerce ("Secretary"), United States Department of Commerce ("Commerce Department"), National Oceanic and Atmospheric Administration ("NOAA"), and National Marine Fisheries Service ("NMFS"). We consider whether the Magnuson-Stevens Fishery Conservation and Management Act's ("MSA") thirty-day statute of limitations, 16 U.S.C. § 1855(f), or the Administrative Procedure Act's ("APA") general six-year limitations period applies to Plaintiffs' challenge to regulations promulgated to implement amendments to fishery management plans. These amendments

were prompted by passage of the American Fisheries Act ("AFA").[1] We also consider whether Plaintiffs have adequately alleged a "failure to act" claim under the APA against NMFS and the North Pacific Council, which is not a party here, related to the promulgation of the challenged regulations. We conclude that the MSA's thirty-day limitations period applies to bar Plaintiffs' direct challenge to the regulations and that Plaintiffs' failure to act claim is an impermissible attempt to recast its direct challenge to the regulations so as to avoid the MSA's shortened limitations period. Accordingly, we affirm the district court's dismissal of Plaintiffs' claims.

I.

A.

In 1976, Congress enacted the MSA, 16 U.S.C. §§ 1801-1883, in an effort to, among other things, "conserve and manage the fishery resources found off the coasts of the United States" and, in particular, within the United States' exclusive economic zone. 16 U.S.C. § 1801(b)(1); *see generally Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1108 (9th Cir. 2006). The MSA provides for the establishment of eight Regional Fishery Management Councils ("Regional Councils") to oversee conservation and management efforts in

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[1] Pub. L. No. 105-277, div. C., tit. II, §§ 205-213, 112 Stat. 2681-621 to 2681-637 (Oct. 21, 1998) (codified at 16 U.S.C. § 1851 note).

various fisheries.[2] 16 U.S.C. § 1852(a), (h). The overall authority to implement those efforts, however, is delegated to the Secretary, who acts through NMFS and NOAA. *See id.* §§ 1853-1854.

The Regional Councils are required to prepare and submit to the Secretary fishery management plans ("FMPs") and any amendments to such FMPs as "are necessary from time to time." *Id.* § 1852(h)(1). FMPs establish general limitations on fisheries, such as seasonal restrictions and gear limitations, in order to "achieve and maintain, on a continuing basis, the optimum yield from each fishery." *Id.* § 1801(b)(4); *see also, e.g.*, 50 C.F.R. pt. 679. FMPs and amendments thereto shall contain, among other things, "conservation and management measures . . . consistent with the [MSA] . . . and any other applicable law." 16 U.S.C. § 1853(a)(1)(C). Upon receipt of a FMP or an amendment, the Secretary must "publish in the Federal Registry a notice stating that the FMP or amendment is available" for a public comment period of sixty days. *Id.* § 1854(a)(1)(B). After receiving comments, the Secretary may approve, reject, or partially approve the submitted FMPs or amendments. *Id.* § 1854(a)(3). Moreover, if the appropriate council

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[2] Each council is made up of "individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned." 16 U.S.C. § 1852(b)(2)(A).

does not make a recommendation, or if the Secretary is not satisfied with the recommendation made, the Secretary can himself prepare a plan or an amendment, likewise utilizing a sixty-day comment period. *Id.* § 1854(c).

The MSA also contains a provision limiting judicial review, which is at the center of this appeal:

> Regulations promulgated by the Secretary under [the MSA] and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, [the Administrative Procedure Act (APA)], if a petition for such review is filed *within 30 days* after the date on which the regulations are promulgated or the action is published in the Federal Register. . . .

Id. § 1855(f)(1) (emphasis added). The actions described in "paragraph (2)" are those "taken by the Secretary under regulations which implement a fishery management plan. . . ." *Id.* § 1855(f)(2).

B.

Additional legislation is implicated by this appeal. In 1998, Congress enacted the American Fisheries Act, which, among other things, attempted to rationalize[3] the North Pacific Pollock Fishery by

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[3] Rationalize means to "make [an industry] more efficient by reorganizing it in such a way as to dispense with unnecessary

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providing exclusive rights to certain companies and vessels. *See* AFA §§ 208-209. In essence, the AFA created bilateral monopolies for fishing cooperatives formed under the AFA, as well as AFA-designated processors. *See* AFA §§ 208(f)(1), 210(b)(1); *see also* Scott C. Matulich et al., *Fishery Cooperatives as an Alternative to ITQs: Implications of the American Fisheries Act,* 16 MARINE RESOURCE ECONOMICS 1, 4 (2001).

Congress recognized that this cooperative scheme could have adverse economic effects on other fisheries and non-participating processors.[4] Accordingly, the AFA calls for the North Pacific Council ("Council"), one of the Regional Councils, to recommend protections,

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personnel or equipment." NEW OXFORD AMERICAN DICTIONARY 1413 (Elizabeth J. Jewell & Frank Abate, eds., 2001).

[4] In discussing the bill that enacted the AFA, Senator Patty Murray stated:

> While we have attempted to include at least a minimum level of protections for these other fisheries, it is clear to many of us that unintended consequences are likely. It is therefore imperative that the fishery management councils not perceive the protections provided in this bill as a statement by Congress that these are the only protections needed. In fact, the opposite is true. . . . Those of us involved intimately in the development of this legislation strongly urge the Councils to monitor the formation of fishery cooperatives closely and ensure that other fisheries are held harmless to the maximum extent possible.

144 CONG. REC. S12,696-03, S12,708 (Oct. 20, 1998) (remarks of Sen. Murray).

referred to as "sideboard protections" or "sideboards," for those fisheries and processors.[5] The Council

> shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by [the AFA] or fishery cooperatives in the directed pollock fishery.

AFA § 211(a); *see* 50 C.F.R. § 679.64 (referring to sideboard protections). Moreover, the AFA provides that the Council "shall" by July 1, 1999 recommend for approval by the Secretary conservation and management measures to prevent overharvesting and to "protect processors not eligible to participate in the directed pollock fishery from adverse effects" resulting from the AFA. AFA § 211(c)(1).[6] It also authorizes the

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[5] The North Pacific Council is one of the eight Regional Councils established by the MSA. 16 U.S.C. § 1852(a)(1)(G). It encompasses the states of Alaska, Oregon, and Washington, and has authority over "the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska." *Id.*

[6] Section 211(c)(1) of the AFA states, in part:

> (1) Required council recommendations. – By not later than July 1, 1999, the North Pacific Council shall recommend for approval by the Secretary conservation and management measures to –
>
> (A) prevent the catcher vessels eligible under subsections (a), (b), and (c) of section 208 [of this note] from exceeding in the aggregate the traditional harvest levels of such vessels in other

(Continued on following page)

Secretary to take action if the Council does not make recommendations or if the Secretary determines that the Council's recommendations are inadequate.[7] *Id.*

C.

The present action focuses on certain regulations promulgated by NMFS in December 2002 ("2002 Regulations"), which concern four amendments to FMPs and their implementing regulations.[8] *See* 67

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fisheries under the authority of the North Pacific Council as a result of fishery cooperatives in the directed pollock fishery; and

(B) protect processors not eligible to participate in the directed pollock fishery from adverse effects as a result of this Act [American Fisheries Act, Pub.L. 105-277, Div. C, Title II, Oct. 21, 1998, 112 Stat. 2681-616] or fishery cooperatives in the directed pollock fishery.

[7] Section 211(c)(1) continues:

If the North Pacific Council does not recommend such conservation and management measures by such date, or if the Secretary determines that such conservation and management measures recommended by the North Pacific Council are not adequate to fulfill the purposes of this paragraph, the Secretary may by regulation restrict or change the authority in section 210(b) [of this note] to the extent the Secretary deems appropriate, including by preventing fishery cooperatives from being formed pursuant to such section and by providing greater flexibility with respect to the shoreside processor or shoreside processors to which catcher vessels in a fishery cooperative under section 210(b) [of this note] may deliver pollock.

[8] The summary to the amendments notes:

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Fed. Reg. 79,692-79,739 (Dec. 30, 2002) (codified in various sections of 50 C.F.R. pt. 679). Plaintiffs were concerned that although the 2002 Regulations provided some protections for non-AFA "shoreside processors"[9] against unfair competition related to pollock fishing, the regulations did not provide adequate sideboard protections for non-AFA shoreside processors with respect to other types of fish, such as salmon. In particular, Plaintiffs complained that these regulations did not restrict AFA-related "floating shoreside processors"[10] from leaving a single geographic

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> The management measures include: measures that allocate the Bering Sea and Aleutian Islands Management Area (BSAI) pollock among the sectors of the pollock processing industry and restrict who may fish for and process pollock within each industry sector; measures that govern the formation and operation of fishery cooperatives in the BSAI pollock fishery; harvesting and processing limits known as sideboards to protect the participants in other fisheries from spillover effects resulting from the rationalization of the BSAI pollock fishery; measures that establish catch weighing and monitoring requirements for vessels and processors that participate in the BSAI pollock fishery; and extension of the inshore/offshore regime for pollock and Pacific cod in the Gulf of Alaska (GOA) through December 31, 2004.

67 Fed. Reg. at 79,692.

[9] "Shoreside processor" is defined as "any person or vessel that receives, purchases, or arranges to purchase, unprocessed groundfish, except catcher/processors, motherships, buying stations, restaurants, or persons receiving groundfish for personal consumption or bait." 50 C.F.R. § 679.2; *see also* AFA § 205(12).

[10] A "floating shoreside processor" or "stationary floating processor" is defined as "a vessel of the United States operating

(Continued on following page)

location in Alaskan waters after the pollock fishing season and relocating to Prince William Sound, Alaska to process salmon, which would impact Sea Hawk's business. In 1999, Sea Hawk had advised the Council of its concerns as an established non-AFA shoreside salmon processor located in Prince William Sound regarding "the anticipated encroachment of AFA-owned or controlled processing vessels into [Prince William Sound]." Sea Hawk alleged that "allowing AFA-created surplus processor ships to enter any Alaska salmon fishery jeopardizes and devalues the established shoreside facilities' investments and development."

The 2002 amendments were developed over a three-year period and involved twelve Council meetings as well as "numerous other public meetings." 67 Fed. Reg. at 79,692. Regarding the provision of notice and a public comment period, the background section to the final rule explains that:

> [w]hile [these amendments] were under development, the deadlines and statutory requirements of the AFA were met on an interim basis through several emergency interim rules.[11] The final [Environmental

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as a processor in Alaska State waters that remains anchored or otherwise remains stationary in a single geographic location while receiving or processing groundfish harvested in the GOA or BSAI." 50 C.F.R. § 679.2.

[11] *See* 16 U.S.C. § 1855(c) (giving the Secretary the authority to promulgate emergency regulations or interim measures,

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> Impact Statement] for [the amendments] contains a summary of the extensive public process involved in the development of the amendments and describes the AFA-related rulemaking completed [up to December 2002]. The proposed rule for [the amendments] was published on December 17, 2001 (66 FR 65028), with comments invited through January 31, 2002. NMFS received 12 letters of comment by the end of the comment period on the proposed rule, many of which contained extensive comments on various sections of the proposed rule. A notice of availability of [the amendments] was published on November 27, 2001 (66 FR 59225), with comments on the Amendments invited through January 28, 2002. NMFS received one comment letter on the amendments that supported approval and no comments that recommended disapproval.

Id. The summary included with the final rule states that these amendments and management measures were necessary "to implement the AFA" and were intended to do so "in a manner consistent with the environmental and socioeconomic objectives of AFA, the [MSA], and other applicable laws." 67 Fed. Reg. at 79,692. The 2002 Regulations also note that they "were developed by NMFS and the Council under the Magnuson-Stevens Act and American Fisheries Act

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and providing that such regulations or measures shall remain in effect for not more than 180 days).

(AFA) to govern commercial fishing for BSAI pollock according to the requirements of the AFA." *Id.* at 79,721 (codified as amended at 50 C.F.R. § 679.1).

Although the AFA required the Council to recommend sideboards for both non-AFA catcher vessels and processors, AFA § 211(c)(1), the Council decided not to take any action with regard to the non-AFA processors, explaining:

> With respect to non-pollock groundfish processing sideboards, the Council took no action. The Council believed that placing non-pollock groundfish processing limits on AFA processors could have negative effects on markets for both AFA and non-AFA catcher vessels. In addition, the Council concluded that its suite of harvesting sideboard restrictions on AFA catcher vessels and catcher/processors also serve to protect non-AFA processors in the BSAI, which are primarily non-AFA catcher/processors. Instead of imposing non-pollock processing limits on AFA processors, the Council indicated its intent to explore revisions to its Improved Retention/Improved Utilization program set out at 50 CFR 679.27. Testimony from non-AFA processors indicated that such changes could be a more effective means of providing a more level playing field for non-AFA catcher/processors.

66 Fed. Reg. at 59,228.

Plaintiffs challenged the Council's decision not to act. In a 2006 letter to NMFS, they requested that

NMFS rescind part of its 2002 Regulations and take appropriate action to protect the non-AFA processors as required by the AFA. In reply, NMFS disputed the application of the AFA to Plaintiffs, noting that the AFA only provides for protection of "other fisheries under [the Council's] jurisdiction." According to NMFS, Plaintiffs, who are located in the territorial sea/ internal waters of Alaska, are not within the Council's jurisdiction under either the AFA or MSA.

D.

On November 8, 2006, nearly four years after the 2002 Regulations were promulgated, Plaintiffs filed a complaint for declaratory and injunctive relief against the Secretary, the Commerce Department, NOAA, and NMFS (collectively, the "Agency"). The complaint challenged the 2002 Regulations and alleged that the Agency failed to act as required by the AFA.

The Agency filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), asserting that Plaintiffs' action was untimely filed under the MSA's thirty-day limitations period. The district court granted the Agency's motion to dismiss and dismissed the lawsuit with prejudice. The court concluded that the 2002 Regulations were issued pursuant to the MSA because they "were developed, published for review, and promulgated under the [MSA's] statutory procedures and by authority delegated to NMFS as part of the [MSA's] overall regulation of the federal

fisheries." As a result, the dismissal was compelled by the thirty-day limitations period in 16 U.S.C. § 1855(f). The district court also rejected Plaintiffs' claim that NMFS failed to implement measures mandated by the AFA.

II.

We review de novo a dismissal for lack of subject matter jurisdiction. *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1110 (9th Cir. 2005). We also review de novo a dismissal based on the running of a statute of limitations. *Ellis v. City of San Diego*, 176 F.3d 1183, 1188 (9th Cir. 1999). We may affirm "on any proper ground supported by the record," *Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir. 2002), but we assume that the material facts alleged in the complaint are true. *Rhoades v. Avon Prods.*, 504 F.3d 1151, 1156 (9th Cir. 2007).

III.

Plaintiffs first argue that the district court erred by applying the MSA's thirty-day statute of limitations instead of the general, six-year statute of limitations that otherwise applies to challenges under the APA. *Compare* 16 U.S.C. § 1855(f)(1), *with Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 942-43 (9th Cir. 2006) ("Although the APA itself contains no specific statute of limitations, a general six-year civil action statute of limitation applies to challenges under the APA."). They contend

that the MSA's expedited review period does not apply to the 2002 Regulations because they were promulgated under the AFA, not the MSA.

Challenges to "[r]egulations promulgated by the Secretary" under the MSA must be brought "within 30 days after the date on which the regulations are promulgated. . . ."[12] 16 U.S.C. § 1855(f)(1); *see also Turtle Island,* 438 F.3d at 944 (stating that "the thirty-day time limit applies whenever a party challenges '[r]egulations promulgated by the Secretary under the [Magnuson Act]' " (alterations in original, citation omitted)). This is a "strict jurisdictional" requirement that cannot be avoided "through careful pleading." *Turtle Island,* 438 F.3d at 945 (citation and internal quotation marks omitted). Because there is no dispute that Plaintiffs' complaint directly challenges the substance of the 2002 Regulations and was filed more than thirty days after those regulations were promulgated, the narrow question here is whether the 2002 Regulations were promulgated under the MSA. *See id.* at 948 ("Section 1855(f) applies only to . . . claims . . . that clearly challenge regulations promulgated under the Magnuson Act.").

We conclude that the 2002 Regulations were promulgated, at least in part, under the MSA.

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[12] Regulations are "promulgated" within the meaning of section 1855(f)(1) when published in the Federal Register. *Turtle Island,* 438 F.3d at 943-44 (citing *Nw. Envtl. Def. Ctr. v. Brennen,* 958 F.2d 930, 934 (9th Cir. 1992)).

Although the Agency's final rule indicates that the 2002 Regulations were intended to "implement" certain AFA-related amendments, 67 Fed. Reg. at 79,692, the "purpose and scope" section of the final rule plainly states that the regulations "were developed by NMFS and the Council under the Magnuson-Stevens Act and American Fisheries Act." 67 Fed. Reg. at 79,721 (codified as amended at 50 C.F.R. § 679.1(k)). Furthermore, as the district court stated, the 2002 Regulations were "developed, published for review, and promulgated" pursuant to the MSA's procedures. For example, in accordance with the MSA's requirements, *see* 16 U.S.C. § 1854(a), the 2002 Regulations were published by the Secretary upon receipt, and a public comment period of sixty days was provided.[13] 67 Fed. Reg. at 79,692. The November 2001 notice and request for public comment regarding the proposed amendments also indicates that NMFS would review the proposed rule implementing the amendments to the FMPs under MSA procedures. 66 Fed. Reg. at 59,228. Based on the foregoing, we conclude that although the 2002 Regulations were intended to implement AFA-related amendments, the regulations were promulgated under the MSA, even if in part.[14]

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[13] Plaintiffs' opening brief acknowledges that NMFS followed the MSA's notice and comment procedures, but contends without supporting authority that this fact is of "*de minimus*" value.

[14] The nature of the relationship between the MSA and the AFA is such that a challenge to the Secretary's actions or inactions under the AFA with respect to FMP amendments is likely to invoke the MSA. The MSA is the vehicle through which

(Continued on following page)

Accordingly, the thirty-day review period bars as untimely Plaintiffs' challenge to the regulations.

We note, in passing, that application of the MSA's thirty-day statute of limitations to Plaintiffs' complaint is not particularly unfair. Plaintiffs had notice of the proposed amendments to the FMPs as early as 1999 and voiced concerns to the Council regarding the impact of the regulations on salmon processors in Prince William Sound. Thus, Plaintiffs cannot legitimately claim surprise regarding the promulgation of the 2002 Regulations and the need to immediately file any suit challenging these regulations.

IV.

We also reject Plaintiffs' challenge to the district court's dismissal of their "failure to act" claim alleged pursuant to the APA, 5 U.S.C. §§ 551, 702, 706(1). Their failure to act claim is an improper attempt to plead around the MSA's thirty-day statute of limitations because the essence of their complaint remains that the Secretary failed to conform to his responsibilities under the AFA and/or the MSA with regard to the specific regulations enacted.

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regulations implementing FMP amendments are promulgated. *See* 16 U.S.C. §§ 1853-1854. The MSA also requires that FMPs be consistent with other applicable law, which would include the AFA. 16 U.S.C. § 1853(a)(1)(C). Accordingly, in order for the MSA's limited judicial review period to have any meaning, it must apply to actions that – like the one here – necessarily challenge the Secretary's obligations under the MSA.

Although Plaintiffs' briefs on this issue lack clarity, their reply brief asserts that the "failure to act was the Council's failure to recommend sideboards to 'protect processors not eligible to participate in the directed pollock fishery from adverse effects as a result of this Act [the AFA] . . . , and NMFS's failure to recognize its power over salmon processor sideboards." In other words, their real complaint is that the 2002 Regulations do not adequately protect shoreside salmon processors like Sea Hawk from floating shoreside processors that might begin processing salmon after conclusion of the pollock season. Specifically, Plaintiffs disagree with the Council's perspective that other sideboard protections would adequately protect non-AFA processors. *See* 66 Fed. Reg. at 59,228. Regardless of the merits of the dispute, Plaintiffs' challenge is to the substance of the 2002 Regulations. Accordingly, the MSA's thirty-day, jurisdictional statute of limitations applies and bars Plaintiffs' lawsuit despite Plaintiffs' characterization of their claim as a failure to act claim. *Cf. Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1193 (9th Cir. 2008) (rejecting plaintiffs' attempt to plead a direct challenge to an order of the FCC as a failure to act claim).

If Plaintiffs' failure to act claim were construed as not being a challenge to the promulgation of a specific regulation but rather as a claim that the Secretary had failed to fulfill his overall obligations under the AFA to protect salmon processors, it still would not state a judicially cognizable claim. The APA

provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," 5 U.S.C. § 702, and that a reviewing court has the power to "compel agency action unlawfully withheld." *Id.* § 706(1).[15] However, the United States Supreme Court has held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to* take." *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004).

Here, the Secretary was not *required* to enact at least some level of protection for salmon processors. The text of AFA § 211(c)(1) provides that if the Council does not make protection recommendations or makes recommendations that are not satisfactory, the Secretary "*may* by regulation restrict or change the authority in section 210(b) . . . to the extent the Secretary deems appropriate. . . ." AFA § 211(c)(1) (emphasis added). Because the word "may" implies discretion, there is no legally *required* action imposed on the Agency. *See Norton,* 542 U.S. at 64 (noting that a court can only compel an agency "to perform a 'ministerial or non-discretionary act'" (citation omitted)).

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[15] The term "agency action" refers to "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

Also, the alleged requirement that the Secretary at least "consider" imposing some sanctions is similarly not discrete or legally required. We have previously rejected the argument that a requirement "to consider" can give rise to an enforceable duty. *See Ctr. for Biological Diversity,* 394 F.3d at 1113 (finding no enforceable duty where the agency had to consider "57 potentially eligible rivers while planning for the use and development of water and related land resources" (citing *Norton,* 542 U.S. at 64-65)). Moreover, as the Supreme Court noted in *Norton,* "[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action."[16] *Norton,* 542 U.S. at 66 (rejecting the claim based on the requirement that

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[16] In *Norton,* the Court was concerned with courts infringing upon the discretion delegated to the agencies:

> The principal purpose of the APA limitations we have discussed – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

542 U.S. at 66-67.

the agency "'manage . . . in a manner so as not to impair the suitability of [certain] areas for preservation as wilderness'" (citation omitted)). Thus, the Secretary's alleged "failure to consider" is not actionable under Section 706(1).

V.

We conclude that Plaintiffs' complaint challenging the 2002 Regulations is governed by the MSA's thirty-day statute of limitations and is thus time-barred. We also conclude that Plaintiffs' complaint cannot be rendered timely through Plaintiffs' attempt to recast their substantive challenges to these regulations as a failure to act claim. Accordingly, the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEA HAWK SEAFOODS, INC., et al., Plaintiffs, v. CARLOS M. GUTIERREZ, in his official capacity as United States Secretary of Commerce et al., Defendants.	CASE NO. C06-1616 JCC ORDER (Filed Aug. 14, 2007)

This matter comes before the Court on Defendants' Motion to Dismiss (Dkt. No. 7) under Federal Rule of Civil Procedure 12(b)(1). The Court has considered the papers filed by the parties in support of and in opposition to the motion, as well as the allegations in the complaint, and has determined that oral argument is not necessary. The Court will GRANT Defendants' motion and ORDER that this case be DISMISSED with prejudice.

Plaintiffs constitute a group of floating shoreside fish-processing vessels in Alaskan waters. They seek judicial review of regulations promulgated by the National Marine Fisheries Service ("NMFS") in 2002 that, according to Plaintiffs, inadequately protect them from the economic effects of a statutory

monopoly granted to other processing vessels. *See, e.g.*, 50 C.F.R. § 679.7(k)(3).

The present motion requires the Court to decide a narrow question: whether the challenged regulations were promulgated under (1) the Magnuson-Stevens Fishery Conservation and Management Act of 1976 ("Magnuson Act"), 16 U.S.C. §§ 1801-1883, or (2) the American Fisheries Act of 1998 ("Fisheries Act"), Pub. L. 105-277, Div. C, Title II, §§ 201-13, 112 Stat. 2681-261 to 2861-637 (codified as a note to 16 U.S.C. § 1851). If the former, Plaintiffs' claim for injunctive and declaratory relief is time-barred by the 30-day limitations period for review of regulations promulgated under the Magnuson Act. *See* 16 U.S.C. § 1855(f). If the latter, the 30-day limitations period in the Magnuson Act does not apply.

Plaintiffs assert that the regulations were developed to implement the economic protection measures mandated by the Fisheries Act. This is true, but the regulations were developed, subjected to public comment, published in the Federal Register, and ultimately promulgated in the Code of Federal Regulations in precisely the manner directed by the Magnuson Act. *See generally* 16 U.S.C. §§ 1853-54. When NMFS published the final regulations in the Federal Register, it explained that the pollock Fishery Management Plan would be amended "to give effect to the required and discretionary provisions of [the Fisheries Act]." 67 Fed. Reg. 76,692 (Dec. 30, 2002) (codified at 50 C.F.R. pt. 679). This demonstrates that NMFS recognized its statutory duty under the

Magnuson Act to amend a Fishery Management Plan to ensure consistency with "any other applicable law," in this case the Fisheries Act. 16 U.S.C. § 1854(a)(1)(A). Indeed, the complaint alleges that by failing to implement the mandates of the Fisheries Act, the regulations violated *the Magnuson Act.* Compl. ¶¶ 30(b) & (c).

The Ninth Circuit has applied the Magnuson Act's 30-day limitations period under similar, if not identical, circumstances. In *Turtle Island Restoration Network v. Department of Commerce,* the court held that the plaintiffs could not avoid the 30-day limitations period by couching their complaint in terms of an Endangered Species Act ("ESA") violation. 438 F.3d 937, 945-46 (9th Cir. 2006). Although the plaintiffs alleged that the administrative decision to reopen a fishery violated the ESA, their real dispute was with the regulations developed by NMFS and promulgated under the Magnuson Act: "Standing alone, [the administrative decision] did nothing. It became operational, and allegedly unlawful, only upon the promulgation of regulations reopening the fishery." *Id.* Because the Magnuson Act contains an explicit directive to amend Fishery Management Plans in accordance with "any other applicable law," regulations implemented to comply with other laws are still deemed promulgated under the Magnuson Act. *See id.* at 946.

Plaintiffs argue that in *Turtle Island* and similar cases, the plaintiffs were "collaterally attacking regulations issued under [the Magnuson Act] by invoking

a right of action created by [the ESA]." Plaintiffs distinguish their own claim as a direct attack on regulations "issued under the [Fisheries Act] for noncompliance with the [Fisheries Act]." Pl's Opp'n 8. This is a false distinction. The regulations in this case were developed, published for review, and promulgated under the Magnuson Act's statutory procedures and by authority delegated to NMFS as part of the Magnuson Act's overall regulation of the federal fisheries.[1]

Plaintiffs' claim for declaratory and injunctive relief is a challenge to regulations promulgated under the Magnuson Act. The complaint is governed by the 30-day limitations period in 16 U.S.C. § 1855(f). Because Plaintiffs did not file their complaint within 30 days of the December 2002 publication of the regulations, the Court lacks subject matter jurisdiction.

The Court hereby GRANTS Defendants' motion and ORDERS that this case be DISMISSED with

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[1] The Court rejects Plaintiffs' argument that NMFS simply failed to implement the economic-protection measures mandated by the Fisheries Act. Plaintiffs are dissatisfied with the scope of the regulations because NMFS did not prohibit authorized pollock processors from competing for salmon caught in Alaska's state waters. *See* 50 C.F.R. § 679.7(k)(3); Fisheries Act § 211(a) (regional council directed to enact measures to protect participants in "other fisheries under its jurisdiction"). The fact that NMFS construed its jurisdiction more narrowly than Plaintiffs would have preferred does not mean that NMFS failed to act.

prejudice. Plaintiffs' Motion for Summary Judgment (Dkt. No. 13) is DENIED AS MOOT.

SO ORDERED this 14th day of August, 2007.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEA HAWK SEAFOODS, INC., an Alaska corporation; et al.,

Plaintiffs-Appellants,

v.

CARLOS M. GUTIERREZ, in his official capacity as United States Secretary of Commerce; et al.,

Defendants-Appellees.

No. 07-35754

D.C. No. CV-06-01616-JCC
Western District of Washington, Seattle

ORDER

(Filed Sep. 21, 2009)

Before: GOULD, TALLMAN and CALLAHAN, Circuit Judges.

The panel votes to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are DENIED.